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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1072

GLENN R. HEYMAN, TRUSTEE IN BANKRUPTCY OF F. W. KOENECKE & SONS, INC.,

Petitioner,

vs.

GEORGE E. MAHIN, SUCCESSOR DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ET AL.,

Respondent.

MOTION OF S. BLOOM, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND PROPOSED BRIEF

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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MOTION OF S. BLOOM, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, S. Bloom, Inc., an Illinois corporation, respectfully requests permission to file instanter the attached brief amicus curiae in support of the petition for certiorari filed by Glenn R. Heyman, Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc. The following grounds are submitted in support of this motion:

1. This case involves a constitutional challenge to a portion of the Illinois Cigarette Tax Act by the Trustee in Bankruptcy of F. W. Koenecke & Sons, Inc., whose business was the wholesale distribution of cigarettes.

2. The same year that this case was filed, Applicant (also a cigarette distributor), as well as five other cigarette dis-

tributors, filed similar suits against the State of Illinois in the Circuit Court of Cook County, Illinois, raising constitutional issues identical to those raised in this case.

3. The State of Illinois recognized the identity of issues among the seven cases filed by the cigarette distributors and on November 4, 1968, filed a motion in this case to consolidate the seven cases on the ground that the other suits raised "identical issues" to those raised in the Koenecke case. This motion has not yet been ruled upon.

4. In the amended complaint in the case presently before the Court, Petitioner makes a two-pronged attack upon the unconstitutionality of the inverse discount system—Sec. 2 of the Illinois Cigarette Tax Act. It is alleged both that (a) the inverse discount system is unconstitutional *on its face* as a patently arbitrary and unreasonable classification of cigarette distributors, and (b) that the inverse-discount system is unconstitutional in its *operational effect* upon petitioner.

5. Although both of these arguments were vigorously urged before the trial court and the Illinois Supreme Court, petitioner's presentation to this Court does not adequately discuss the issue of the unconstitutionality of the statute on its face. Petitioner instead concentrates on the statute's operational effect, necessarily dwelling at length on facts peculiar to its situation. This approach obscures the simple constitutional issue involved.

6. The *first* inquiry by this Court must be whether there is any conceivable set of facts that would sustain the statute attacked; if there is none, the statute must be held unconstitutional on its face. This Court need not consider any of the factual allegations concerning the statute's operational effect, because the statute is demonstrably arbitrary and unreasonable in its failure to treat all cigarette distrib-

utors equally, even if all of the factual arguments raised by Respondent are conceded.

7. Petitioner's argument overemphasizes the statute's operational effect, neglecting the simple constitutional issue which is of paramount importance to Applicant and the other concerned cigarette distributors. A ruling that the statute is unconstitutional on its face would effectively put an end to the controversy concerning the statute and avoid the possibility of seven separate trials concerning the statute's operational effect.

8. Applicant has attempted to obtain the consent of the parties to file this brief, but consent has been refused by the respondent.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE INVERSE DISCOUNT SYSTEM IS UNCONSTITUTIONAL ON ITS FACE

Given the fact that the purpose of the discount is to compensate distributors for their tax collection costs, the apparent legislative premise behind *decreasing* the amount of discount as the distributor's yearly dollar total of tax stamp purchases *increases* is that distributors' per unit costs of collection decrease with increased volume. Thus, the legislature was conceivably attempting to equalize the economic burden of collecting the tax among distributors.

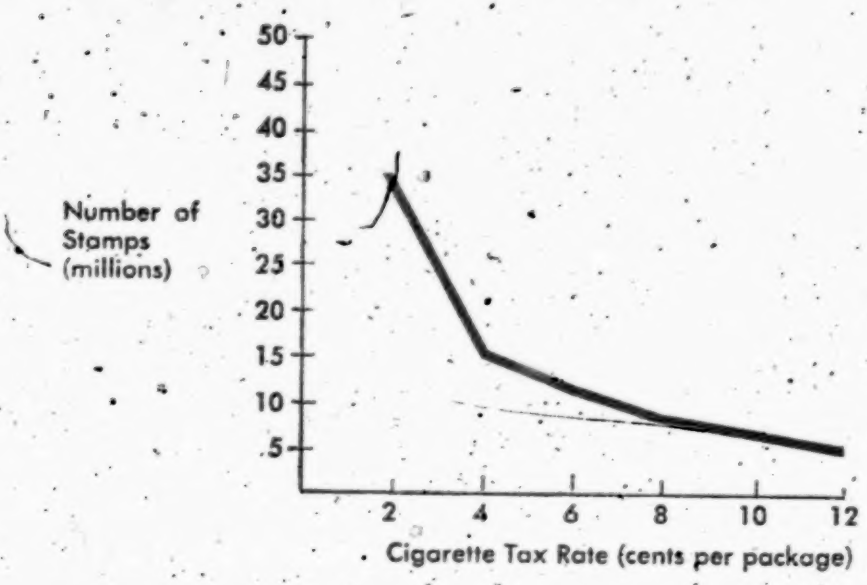
The Illinois Supreme Court sustained the inverse discount system on the ground that costs do, in common experience, decrease with increased volume; hence the legislative classification was reasonable. However, the argument that the inverse discount system is unconstitutional on its face *does not dispute this factual premise;* even if costs of collection do decrease with increased volume, the discount system is unconstitutional precisely because it does *not* classify distributors on a cost-volume basis.

The discount system classifies distributors, not by the volume of their stamping activity, but by the yearly dollar total of their tax stamp purchases. Since a tax stamp must be affixed to every package of cigarettes, it is true that a distributor's volume can be measured by the *number* of stamps it purchases. However, the classification here attacked is in terms of the *dollar total* of a distributor's stamp purchases, which is a function of two interrelated variables—price per tax stamp and number of stamps purchased.

An increase in the cigarette tax rate increases the price

per tax stamp, which in turn decreases the number of tax stamps equalling $700,000, (the incremental break points of the various discount brackets), as shown on the following table:

Relationship Between Cigarette Tax Rate and Number of Tax Stamps Equalling $700,000

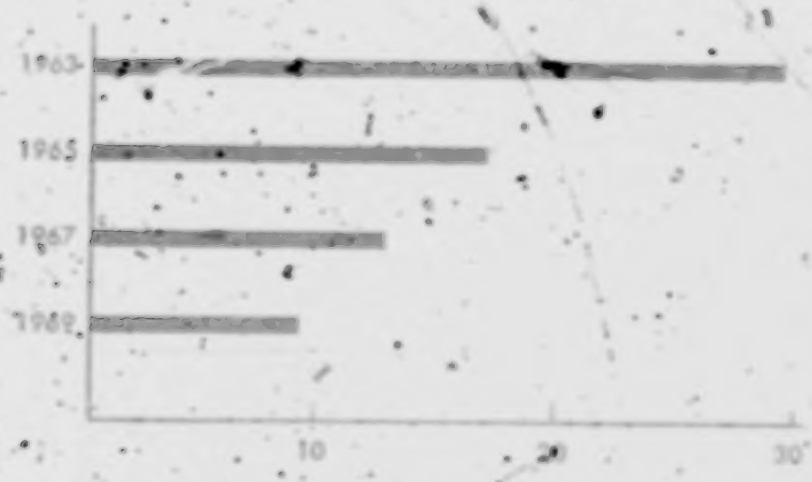


Thus, every time the cigarette tax rate is changed, the $700,000 classification brackets are automatically altered in terms of the volume of cigarettes stamped. As one goes up, the other necessarily goes down.

Since the inverse volume discount system was first inaugurated in 1963, the Illinois legislature on several occasions, *increased* the cigarette stamp tax rate (from 4¢ per pack in 1963 to 9¢ in 1969) and, simultaneously, *decreased* the distributor's discount percentages within the $700,000 brackets (in order to maintain the same rate of discount

compensation for each case of cigarettes stamped; but no change was made in the 5/32% discount. As a result, each increase in the tax rate has automatically decreased the volume of stamping required to raise a distributor into a lower discount bracket.

Number of Cases of Cigarettes (In Thousands) Equalling $700,000 of Stamps



Thus, in 1963 a distributor reached $700,000 of stamp purchases and moved to a lower discount bracket when he stamped 140,000 cases, as compared with 70,000 cases in 1951.

The way in which the Legislature has handled the changes in the tax and discount rates dramatically illustrates the

[illegible] to the Illinois Supreme Court's presumption that the [illegible] discount brackets reflect a rational cost-volume approach to the classification of distributors. Whatever is the true relationship between a distributor's volume of business and his per unit costs of collecting the cigarette tax, it is obvious that there is no rational connection between that relationship and the discount system at issue. In terms of volume, a distributor now passes to a lower discount bracket three times as fast as he did in 1952, not because his per unit stamping costs have decreased by two-thirds, but solely because of increases in the cigarette tax rate. . . .

The same type of irrational classification was struck down in the *Stewart Dry Goods* case. There, a graduated sales tax on retail merchants measured by gross receipts was held to violate the Equal Protection Clause because it created an arbitrary and unreasonable classification of merchants. The Court recognized that Kentucky, like Illinois in this case, had provided for a graduated tax on the apparent premise that greater receipts mean greater profit, with concomitant increased ability to pay. It was held, however, that gross receipts were not a rational measure of profitability of the enterprise, hence the tax created an irrational classification (294 U.S. at 558-59):

> "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing rates of profit; and that gross and net profits vary with the character of the business as well as its volume."

The inverse discount system here in issue is even further removed from its intended purpose than was the tax in

Stewart Dry Goods, because the inverse discount is not even graduated on the basis of sales volume, let alone distributors' costs of handling the tax collection function for the State.

The *Stewart Dry Goods* decision is not the only example of classifications held unconstitutional because the criterion of classification was unrelated to the apparent legislative purpose. In *Air-Way Corp. v. Day*, 266 U.S. 71, 83 (1924), a state statute which measured a franchise tax on corporations by the number of no-par shares of that corporation's stock was held invalid:

> "The number of non-par value shares of the corporation is not an indication of, and does not purport to be a representation as to the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee."

Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937), held unconstitutional a statute forbidding stock insurance companies to act through agents who were their salaried employees, but permitting mutual insurance companies to act through such employees. It was held that, in determining the reasonableness of classification (301 U.S. at 462):

> "'[M]ere difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."'

CONCLUSION

While there may indeed be differences among cigarette distributors in terms of their costs of stamping and collecting the cigarette tax, any correlation between these differences and the method of classification adopted by the Illinois legislature is wholly fortuitous, since the classification is made neither in terms of distributors' sales volume nor in terms of their tax collection costs. The inverse discount system, predicated solely on the dollar value of stamp purchases, is an arbitrary and unreasonable classification of distributors, in violation of the equal protection clause.

Respectfully submitted,

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